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SUPREME COURT, U.S.

(2)

No. 07-574

IN THE

Supreme Court of the United States

MOTIONLESS KEYBOARD COMPANY,

Petitioner,

v.

MICROSOFT CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should exercise its supervisory powers to review the Federal Circuit's routine exercise of its discretion to deny Petitioner's request for additional time to seek panel rehearing.

2. Whether this Court should review the Federal Circuit's fact-bound ruling that Petitioner's claims for infringement under the doctrine of equivalents were correctly rejected by the district court on summary judgment, where (a) Petitioner had adduced insufficient evidence to support those claims, (b) acceptance of those claims would entirely vitiate at least one of the relevant patent claim elements, and (c) those claims would ensnare prior art.

CORPORATE DISCLOSURE STATEMENT

Respondent Nokia, Inc.'s parent corporation is Nokia Holding, Inc. Nokia Holding, Inc.'s parent corporation is Nokia Corporation. Nokia Corporation is the only publicly traded Nokia entity, and no publicly held company owns more than 10% of Nokia Corporation's stock.

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BRIEF IN OPPOSITION FOR RESPONDENT NOKIA, INC.

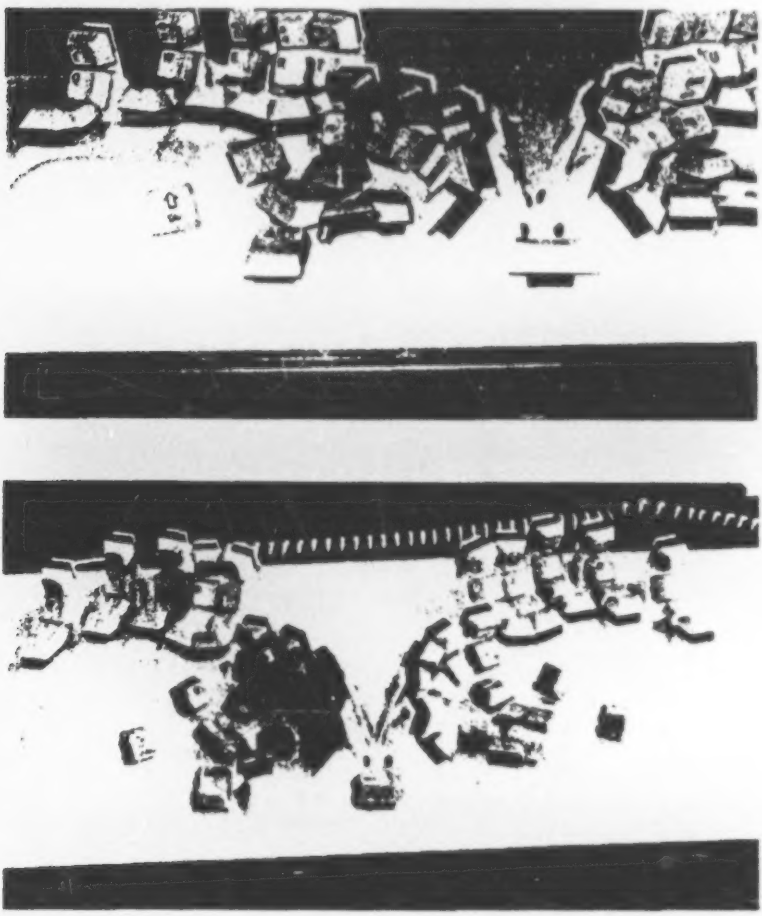
STATEMENT

1. U.S. Patent No. 5,332,322 (the "'322 patent"), is the remaining patent at issue in this case. U.S. Patent No. 5,178,477 (the "'477 patent"), had originally been asserted, but Petitioner did not appeal the district court's ruling of non-infringement as to that patent. The '322 patent is entitled "Ergonomic Thumb-Actuable Keyboard for a Hand-Grippable Device" and refers to a keyboard input device for transmitting information to an electronic system, such as a telephone switching system or a computer. Pet. App. A25-27. More particularly, the patent "relates to such a device wherein the keyboard is specially ergonomically designed with reference to the architecture of the human hand in such fashion that, at least with respect to the thumb on the hand, only slight gestural motion is required for effective, multiple, differentiated key actuation." *Id.* A33.

The device claimed by the '322 patent consists of three distinct elements: a "housing" with "a grippable portion which permits the device to be held in one hand with the thumb free to move at least temporarily"; a "concavity in said housing"; and "a thumb-associable cluster of keys forming a keyboard within said concavity." *Id.* A49. The '322 patent does not claim a concavity in the keypad or in any of the keys of the device. Further, the patent requires a keyboard having keys that can be actuated through slight gestural motion of the thumb "within" the "concavity" in the housing. *Id.* A48-49. This keyboard is designed to be dialed using side-to-side

and forward translations of the thumb within the housing's concavity, as opposed to the conventional actuation using an inward bending and downward motion of the thumb tip. *Id.* A27.

The following are pictures of a keyboard that is an admitted embodiment of the '322 patent:

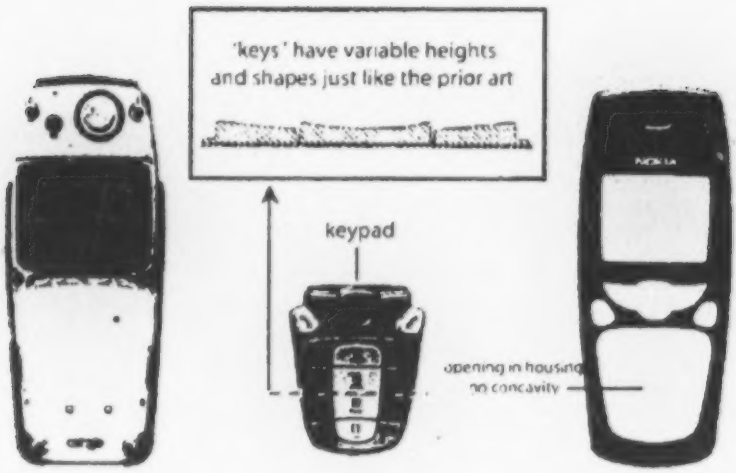


S.A. 67sa-68sa.

2. Petitioner Motionless Keyboard Company ("MKC") owns the '322 patent. On February 9, 2004, at the direction of Thom Gambaro, the company's controlling director and the named inventor of the '322 patent, MKC filed suit against Respondents Microsoft Corporation (Microsoft), Nokia, Inc. (Nokia), and Saitek Industries (Saitek) (collectively, "Respondents") in the United States District Court for the District of Oregon. MKC alleged infringement by all Respondents of the '322 patent, and by Respondents Microsoft and Saitek of the '477 patent, but as noted, MKC did not appeal the district court's ruling of non-infringement of the '477 patent, so only the '322 patent remains at issue. Pet. App. A4.

Specifically, MKC alleged that Respondents' devices–video game joysticks manufactured by Microsoft and Saitek and cellular telephones manufactured by Nokia–infringed the '322 patent by incorporating thumb actuation of keys within a concavity in the housing of the device. *Id.* According to MKC, the accused devices infringed both literally and under the doctrine of equivalents. *Id.*

Each of the accused Nokia phones has a keypad and a display. The accused phones do *not* contain a concavity in the housing at a key-actuation position into which a user can place a thumb. The figures of the accused phones demonstrate that the keys are part of a keypad that is placed onto a flat surface in each phone, with the keys protruding through an opening in the housing of each phone, rather than residing "within" any concavity.



Id. A11.

Some of the accused phones employ keypads that are not completely flat. To the extent that the slight depressions in some of the keys could be characterized as a "concavity," such a concavity is in the keypad itself, not in the housing of the phone, and the keys are activated by the conventional downward motion, not by "a slight gestural motion" of the thumb within the concavity.

3. On May 6, 2005, after the close of discovery, the district court granted Respondents summary judgment of non-infringement of the '322 patent. S.A. 1sa-50sa. The district court also granted Respondents' joint motion that the '322 patent is invalid, based upon the inventor's prior public use of the invention. *Id.* 50sa-66sa.

a. The district court construed the terms of the '322 patent "concavity in said housing" and "keyboard within said concavity" to mean that "the concavity must be formed by a depression in the housing of the

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device, and that all keys comprising the keyboard must be contained entirely within the concave area and sunk below the surface of the housing, so that the thumb movement occurs within the concave area." S.A. 38sa. Based upon the plain language of the claim, the patent specification, and the prosecution history, the district court rejected MKC's argument that the '322 patent encompasses either a "concavity" formed by the tops of the keys or an opening in the housing for the keyboard. *Id.* 33sa-38sa. The court recognized that the plain language of the patent claims requires that the keyboard be "within" the concavity, and that the keyboard cannot be "within" the concavity if it is the tops of the keys or the keyboard that forms the concave surface: "[I]f the court construed 'concavity' to include a depression formed by the tops of the keys or the keyboard, the claim limitations that require the concavity to be 'in' the housing and the keyboard to be 'within' the concavity would have no meaning." *Id.* 35sa.

The court further noted that the patent specification also describes keys positioned "in a concavity or depression" in the housing and illustrates the concavity as a bowl-like depression in the housing of the device. *Id.* The court recognized that the specification makes no reference to a concavity formed by the keys of the keyboard, and no specification drawing suggests that the keys or keyboard form the claimed concavity. *Id.* 35sa-36sa.

The district court thus expressly rejected MKC's proposed construction that the keys *themselves* can form the "concavity in the housing" called for by the '322 patent. *Id.* 33sa-38sa.

The district court rested this rejection not only on the patent's plain language, but also on the prosecution history–relying on prosecution estoppel resulting from a prior patent interference proceeding where the Administrative Patent Judge conclusively stated that the '322 patent did *not* cover a concavity formed by a keypad:

> Gambaro's claim 1 recites "a concavity in said housing . . . and a cluster of keys forming a keyboard in said concavity." Gambaro's claim does not recite a "concave keypad surface." . . . That the keyboard is positioned in the concavity does not mean that the keyboard itself conforms to the concavity."

Id. 36sa-37sa.

b. Based upon this construction, the district court held that the accused devices do not infringe the '322 patent. With specific respect to Nokia, the court held that there was no infringement because the cellular phones do not contain the claimed "concavity" in their housings or keypads "within" that concavity. S.A. 47sa-49sa.

First, the district court held that the accused Nokia phones did not literally infringe the '322 patent:

> I do not find that an opening in the cover of the Nokia phones meets the claimed limitation of "concavity" as construed by the court. An opening in a phone cover is not a "depression" sunk down below the surface of the housing. Likewise, I find that none of the phones contain a concavity by virtue of the slight depression formed by the keys or keypad surfaces, because the concavity must

> be in the "housing" of the device and the keypad must be located "within" the concavity to accommodate thumb actuation of the keys. If the keypad forms the concavity, the keys are not "within" the concavity, and the keypad cannot be activated by moving the thumb within the concavity.

Id. 48sa-49sa.

Second, the district court held that Nokia does not infringe the '322 patent under the doctrine of equivalents. The court noted that MKC had presented no evidence "that the accused [Nokia] phones perform substantially the same function in substantially the same way to obtain substantially the same result" as the claimed invention. *Id.* 49sa. Further, the district court held that the fact that MKC's equivalents theory "would vitiate the[] claimed elements" of the '322 patent requiring the keyboard to be "within the concavity of the housing" was an independently sufficient ground for rejecting that theory. *Id.* 35sa, 49sa. Finally, the court recognized that MKC is estopped from relying on the doctrine of equivalents to cover the sloped surface of the keypad because MKC's claim would "ensnare the prior art Einbinder patent." *Id.* 49sa.

c. In addition to holding that the Respondents do not infringe the '322 patent, the district court held that the patent is invalid because the invention had been in public use more than one year before the filing of the patent applications. S.A. 52sa-58sa. The district court rooted this public use holding in Gambaro's disclosure of his Cherry Model 5 keyboard—an admitted embodiment of the patent—

to investors for commercial purposes four years before the filing of the patent. *Id.*

4. On May 29, 2007, the Federal Circuit issued a decision affirming the district court's grant of summary judgment of non-infringement in Respondents' favor. The Federal Circuit upheld both the district court's construction of the '322 patent and its holding of non-infringement. Pet. App. A6-13. The Federal Circuit agreed with the district court that "[b]y using the terms 'concavity in said housing' and 'keyboard within said concavity,' the patentee defined a depression within the housing of the device and set the keyboard entirely within that depression." *Id.* A7. Accordingly, the Nokia cellular phones "do not literally infringe the '322 patent because [they] lack a concavity in the housing and a keyboard within the cavity." *Id.* A8.

The Federal Circuit also affirmed the district court's holding that the accused devices do not infringe the '322 patent under the doctrine of equivalents. *Id.* A11. As the Federal Circuit pointed out, "MKC only presented the district court with conclusory statements about equivalents." *Id.* This failure to put forward "particularized evidence and linking argument as to the insubstantiality of the differences between the claimed invention and the accused device" meant that MKC had not offered sufficient proof for a reasonable jury to find equivalence between the patented technology and the accused devices. *Id.* (internal quotations omitted).

MKC's evidentiary deficiency was particularly significant with respect to the infringement claims against Nokia. The court noted that MKC offered no

evidence "that the accused [Nokia] phones perform substantially the same function in substantially the same way to obtain [substantially] the same result" as the device covered by the '322 patent. *Id.* A12. Moreover, the court explained that while the '322 patent "points to actuation of the keys by thumb movement within the concavity, a user would actuate the Nokia keys by pressing them downward." *Id.* A13. Accordingly, the court held that "[a]s MKC did not provide any particularized testimony to specifically show that the keys work in the same way, the trial court properly granted summary judgment of non-infringement under the doctrine of equivalents." *Id.*

The Federal Circuit reversed the district court's ruling on invalidity and concluded that the '322 patent is valid, reasoning that the demonstrations noted by the district court did not involve sufficient actual uses of the patented technology to constitute invalidating prior uses. *Id.* A13-A18.

MKC never sought rehearing of the Federal Circuit's decision on the infringement claim. Instead, on June 12, 2007–the last day on which the parties could seek a panel rehearing–MKC filed a motion for extension of time in which to seek panel rehearing, citing a fire that Mr. Gambaro had caused in his apartment building and that there had been certain settlement communications between the parties. *Id.* A22-24; S.A. 87sa-94sa. Respondents also filed a motion for a corresponding extension of time in order to preserve their right to seek rehearing of the panel's holding on the validity issue in the event that MKC's motion for additional time were granted. S.A. 83sa-86sa. On June 14, 2007, the Federal Circuit

denied both motions in a written order without opinion. Pet. App. A20-21.

REASONS FOR DENYING THE WRIT

I. MKC'S CONTENTION THAT IT SHOULD HAVE BEEN PROVIDED ADDITIONAL TIME TO SEEK REHEARING IS NOT APPROPRIATE FOR CERTIORARI

MKC's contention that this Court should grant certiorari because the Federal Circuit denied its motion for additional time to seek rehearing is plainly unworthy of this Court's review. MKC cites *no* case from this Court to support its claim that the Federal Circuit so "departed from the accepted and usual course of judicial proceedings," Pet. 7, that a grant of certiorari is warranted. The reason for this omission is evident, as it appears that this Court has *never* exercised its supervisory authority to review a court of appeals' denial of a motion for additional time to seek rehearing, and it should not do so here.

As MKC concedes, the disposition of a motion for additional time to seek rehearing is a "discretionary ruling[]" entrusted to the court of appeals. *Id.* at 8; *see also* FED. R. APP. P. 40(a)(1). So long as the Federal Circuit "ke[pt] within the bounds of judicial discretion," its denial of MKC's motion is "not reviewable" by this Court. *In re Burwell*, 350 U.S. 521, 522 (1956) (refusing to review a court of appeals' use of a particular procedure for reviewing applications for certificates of appealability); *see also Shenker v. Balt. & Ohio R.R. Co.*, 374 U.S. 1, 5 (1963) (deferring to a court of appeals' discretionary denial of a petition for rehearing *en banc* because "to hold otherwise would involve [this Court] unnecessarily in

the internal administration of the Courts of Appeals"); *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (deferring to a court of appeals' "free[dom] to devise its own machinery to provide the means whereby a majority may order" rehearing *en banc*).

MKC makes no serious argument that the Federal Circuit deviated from the bounds of its discretion in denying the motion for additional time. *First*, MKC's contention that "discretionary rulings are to be accompanied by written findings," Pet. 8-9, simply ignores both that Rule 40 prescribes no requirement of written findings and that the courts of appeals ordinarily do not and need not issue findings in every case when ruling on motions for additional time to seek rehearing. Indeed, the Federal Circuit's denial of MKC's motion conformed with the common practice in the courts of appeals, which routinely deny, without explanation, myriad motions for additional time to seek rehearing. Accordingly, the Federal Circuit acted wholly *consistent* with, rather than *contrary* to, "the accepted and usual course of judicial proceedings," and, thus, there is no basis for this Court's supervisory intervention. SUP. CT. R. 10(a).

Second, MKC's underdeveloped claim that Rule 40 raises "serious questions as to the equal protection[ ] of the laws," Pet. 10, is unpersuasive and puzzling given that all the parties in this case were subject to the same time limitation in which to seek rehearing. Surely, the Federal Circuit was not obligated to grant additional time to seek rehearing on the ground that Mr. Gambaro, who was not a party to the proceedings

below, had caused an explosion and fire in his apartment building. S.A. 87sa-94sa.

Third, MKC's attempt to bootstrap its assertion of discretionary abuse around the merits of its infringement claim, *see* Pet. 10-11, is unavailing. A court's discretion to grant or deny additional time for a filing is not dependant upon the ultimate merits of that filing. Moreover, the same panel that denied MKC's motion for additional time had already determined that, in fact, MKC's infringement claim was meritless. Pet. App. A6-13.

Finally, MKC fails to explain how the federal policy in favor of settlement allegedly contravened by the Federal Circuit, *see* Pet. 9, bears on cases, such as this one, that have already been adjudicated by a court of appeals. Indeed, Respondents stood to gain very little from any prospective settlement *after* the Federal Circuit upheld summary judgment in their favor on MKC's infringement claim. In fact, it was MKC that expressed interest in exploring settlement, and respondents only sought an extension of time in order to preserve their right to seek rehearing on the validity issue in the event that MKC's motion for additional time were granted. On this score, it is difficult to imagine that the Federal Circuit's denial of MKC's motion for additional time somehow violated the federal policy in favor of settlement, much less that it did so in a manner calling for the exercise of this Court's supervisory authority.

II. THERE IS NO REASON FOR THIS COURT TO REVIEW THE FEDERAL CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT OF NON-INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS

This Court should deny the petition for a writ of certiorari with respect to the merits of the Federal Circuit's decision on non-infringement for three reasons. *First*, the decision below is narrow and fact bound, and is plainly correct, as the Federal Circuit faithfully adhered to this Court's precedent regarding the doctrine of equivalents in applying the correct standard of proof, and Petitioner proffered insufficient evidence to survive summary judgment. *Second*, there is no conflict or disuniformity in the lower courts as to the governing rule of law that would prescribe this Court's intervention. *Finally*, this case is a poor vehicle for addressing the standard for infringement under the doctrine of equivalents because, as the district court recognized, MKC's equivalents claims require the vitiation of at least one element of the relevant patent claims and would plainly ensnare prior art.

A. The Decision Below Is Narrow, Fact Bound, And Plainly Correct

The decision below presents no recurring or important issue because it was a narrow, fact bound determination that the requirements for application of the doctrine of equivalents were not satisfied based on the specifics of the patent claims involved, the record below and the arguments advanced by Petitioner before the district court.

1. Under the doctrine of equivalents, "a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention." *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 609 (1950)). Analysis of a claim of infringement under the doctrine of equivalents is inherently fact and case specific. "'What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case.'" *Id.* at 24 (quoting *Graver Tank*, 339 U.S. at 609). Accordingly, "[a]n analysis of the role played by each element in the context of the specific patent claim" is necessary to "inform the inquiry as to whether a substitute element matches the function, way, and result of the claimed element, or whether the substitute element plays a role substantially different from the claimed element." *Id.* at 40.

This required analysis will necessarily differ from case to case and involves the fact bound determination whether, in the context of a particular patent claim, an element substituted for an element in the claim performs substantially the same function in substantially the same way, and would lead to substantially the same result, as the claim element. Such a determination is inherently unworthy of this Court's review.

2. This case is particularly unworthy of review because the decision below is plainly correct, as the record below contained insufficient evidence to

support Petitioner's claims under the doctrine of equivalents. As this Court explained in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Thus, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323 (citation omitted). Additionally, this Court explained in *Warner-Jenkinson* that "[e]ach element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim." 520 U.S. at 29.

In light of these well-established rules, the Federal Circuit explained in *General Electric Co. v. Nintendo Co.*, 179 F.3d 1350, 1359 (Fed. Cir. 1999):

> Under [*Celotex*], GE has the burden of presenting enough evidence so that a reasonable jury could conclude that the alleged Nintendo systems infringe the '659 patent under the doctrine of equivalents. This burden means that GE had to present evidence that every limitation of the '659 patent . . . is met . . . by the alleged Nintendo systems.

Thus, GE's "failure to present evidence" of similarity on one of the elements of the patent "render[ed] summary judgment of non-infringement . . . appropriate." *Id.*

More recently, in *AquaTex Industries, Inc. v. Techniche Solutions*, 479 F.3d 1320, 1328-29 (Fed. Cir. 2007), the Federal Circuit reiterated that an equivalents claimant bears an ultimate burden of establishing infringement "by a preponderance of the evidence," and that this burden subsumes an obligation to provide "particularized evidence" on summary judgment as to the similarity of each substituted claim element. Accordingly, because the claimant in that case failed to offer "particularized testimony" of an "insubstantiality of difference" between the elements of relevant claims and the elements of the accused device, it could not discharge its preponderance burden and, therefore, summary judgment in favor of the defendant was proper. *Id.*

In this case, the court below faithfully followed this Court's guidance in determining that MKC had utterly failed to shoulder its burden to present evidence of insubstantial differences in the accused Nokia telephones as to each claim element not literally present. The court below explained that, "MKC only presented the district court with conclusory statements about equivalents." Pet. App. A11. MKC, for example, offered no evidence "that the accused [Nokia] phones perform substantially the same function in substantially the same way to obtain [substantially] the same result" as the device covered by the '322 patent, and produced no "testimony to specifically show that the keys" of the two devices "work in the same way." *Id.* A12-13.

Indeed, the evidence that MKC did offer in support of its infringement claims comes nowhere close to fulfilling the requirements to survive summary judgment. MKC's only expert witness–the patent attorney who originally prosecuted the '322 patent–made absolutely no reference to the doctrine of equivalents and offered no analysis as to whether the accused devices were substantially similar to the patented technology. S.A. 74sa-82sa; *id.* 42sa-43sa & n.5. In fact, the only testimony MKC identifies in its Petition that even arguably bears on its equivalents theory is the unsubstantiated statement of the inventor that "a concavity formed by the top surfaces of a cluster of keys is the functional equivalent of a concavity in the housing" because "it would be obvious to one reasonably skilled in the art of ergonometric keyboard design, such as myself, that the two are interchangeable." Pet. 15 (internal quotation omitted). But this conclusory statement is plainly insufficient to discharge MKC's summary judgment burden. *See Celotex*, 477 U.S. at 322-24; *Warner-Jenkinson*, 520 U.S. at 40.

3. MKC's contention that the Federal Circuit adopted a heightened summary judgment standard with respect to equivalents claims, Pet. 13, is meritless. Contrary to MKC's argument, the requirement of "particularized evidence" means that an equivalents claimant must offer at summary judgment evidence distinct from that presented in support of literal infringement and that is related to each *particular* element of similarity. Thus, the "particularized evidence" formulation is plainly not a heightened summary judgment standard; it is simply an application of the fundamental rule that summary

judgment is warranted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S. at 322. Thus, there was no error, let alone reviewable error, in the Federal Circuit's use of that formulation here. Under any meaningful pleading standard, MKC presented insufficient evidence to survive summary judgment.

B. There Is No Conflict Or Confusion In The Lower Courts As To The Legal Rule Governing Infringement Under The Doctrine Of Equivalents

MKC does not even attempt to show the existence of any split of authority regarding the legal rule applicable to infringement claims under the doctrine of equivalents. Indeed, there is no such split of authority: This Court has held for nearly sixty years that an equivalents claim is "a determination of fact" requiring a showing that the accused device "performs substantially the same function in substantially the same way to obtain the same result." *Graver Tank*, 339 U.S. at 608 (internal quotations omitted); *see also Warner-Jenkinson*, 520 U.S. at 25-29 (reiterating the *Graver Tank* rule); *Malta v. Schulmerich Carillons, Inc.*, 952 F.2d 1320, 1328 (Fed. Cir. 1991) (to prove infringement under the doctrine of equivalents, "a patentee must prove that each prong of the *Graver Tank* equivalency test is met").

Moreover, the Federal Circuit and other lower courts uniformly apply the requirement that an equivalents claimant put forward "particularized evidence" as to "'the insubstantiality of the

differences' between the claimed invention and the accused device, or with respect to the 'function, way, result' test." Pet. App. A11-12 (collecting cases); *see also Lear Siegler, Inc. v. Sealy Mattress Co. of Mich.*, 873 F.2d 1422, 1426 (Fed. Cir. 1989); *Tyco Healthcare Group LP v. Ethicon Endo-Surgery, Inc.*, No. 04-1702, _ F. Supp. 2d _, 2007 WL 2936240, at *13-14 (D. Conn. Oct. 8, 2007); *Sprint Commc'ns Co. v. Vonage Holdings*, 500 F. Supp. 2d 1290, 1342-45 (D. Kan. 2007); *Lucas Aerospace, Ltd. v. Union Indus., L.P.*, 899 F. Supp. 1268, 1280 (D. Del. 1995).

The lower courts have expressed no confusion regarding the scope or application of the "particularized evidence" requirement. Indeed, the lower courts have applied that requirement with remarkable consistency and clarity, particularly at the summary judgment phase. *Compare, e.g.*, *AquaTex Indus.*, 479 F.3d at 1328-29 (upholding a grant of summary judgment where the claimant failed to offer any evidence of an insubstantiality of difference between the devices); *with Tyco Healthcare*, 2007 WL 2936240, at *13-14 (denying summary judgment where the claimant offered expert testimony that the devices performed the same function in a substantially similar way); *Sprint Commc'ns*, 500 F. Supp. 2d at 1342-45 (denying summary judgment where expert testimony showed substantial similarity).

MKC sets forth no conflict or confusion for this Court to resolve.

C. This Case Is A Poor Vehicle For Addressing The Pleading Standards For Infringement Claims Under The Doctrine Of Equivalents

This case is a poor vehicle for addressing the pleading standards for infringement claims under the doctrine of equivalents because the district court's grant of summary judgment was based upon two alternative grounds having nothing to do with pleading requirements. *First*, MKC's equivalents theory is invalid because it would entirely vitiate at least one element of the '322 patent. *Second*, MKC's equivalents theory is invalid because it would ensnare prior art.

1. This Court explained in *Warner-Jenkinson* that "[i]t is important to ensure that the application of the doctrine [of equivalents], even as to an individual element, is not allowed such broad play as to effectively eliminate that element in its entirety." 520 U.S. at 29. Thus, the Federal Circuit has steadfastly refused to apply the doctrine where doing so would "vitiate an entire claim limitation." *Panduit Corp. v. HellermanTyton Corp.*, 451 F.3d 819, 830 (Fed. Cir. 2006) (internal quotations omitted); *see also Freedman Seating Co. v. Am. Seating Co.*, 420 F.3d 1350, 1361 (Fed. Cir. 2005) ("In the instant case, we think the district court's finding of infringement under the doctrine of equivalents had the effect of entirely vitiating the 'slidably mounted' limitation."), *cert. denied*, 546 U.S. 1150 (2006); *Seachange Int'l, Inc. v. C-COR, Inc.*, 413 F.3d 1361, 1378 (Fed. Cir. 2005) (holding that infringement under patent holder's equivalents theory "would vitiate the requirement that every processor be connected to

every other processor point-to-point, and therefore must fail as a matter of law").

As the district court recognized, MKC's equivalents theory here cannot stand because it would "vitiate" at least one element of the '322 patent. S.A. 35sa, 49sa. The '322 patent requires a "concavity in the housing" and a cluster of keys forming a keyboard "within" that concavity. Pet. App. A49. If the keys themselves were construed as the concavity, the keys could not be *within* the concavity, and the claim element requiring a keyboard "within the concavity" would be entirely vitiated. As the district court held, this prospect of vitiation provided independently sufficient grounds for summary judgment in Respondents' favor on MKC's equivalents claim. S.A. 35sa, 49sa.

2. In addition, "a patentee should not be able to obtain, under the doctrine of equivalents, coverage which he could not lawfully have obtained from the PTO by literal claims." *Wilson Sporting Goods Co. v. David Geoffrey & Assocs.*, 904 F.2d 677, 684 (Fed. Cir. 1990), *overruled in part on other grounds by Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83 (1993). Thus, "[b]ased on the fundamental principle that no one deserves an exclusive right to technology already in the public domain, [the Federal Circuit] has consistently limited the doctrine of equivalents to prevent its application to ensnare prior art." *Marquip, Inc. v. Fosber Am., Inc.*, 198 F.3d 1363, 1367 (Fed. Cir. 1999).

Under this rule, the district court held in the alternative that because a prior art Einbinder patent teaches a concave keypad surface, MKC could not

rely on the doctrine of the equivalents to establish infringement of the '322 claims with respect to the concave keypad surface of some of the Nokia phones. "[P]laintiff is estopped from relying on the doctrine of equivalents to cover the sloped surface of the keypad, because to do so would ensnare the prior art Einbinder patent." S.A. 49sa. This independent basis for summary judgment further renders this case unsuitable for certiorari.

In short, this case presents an inappropriate vehicle for addressing the pleading standards of a claim under the doctrine of equivalents. MKC presented plainly insufficient evidence to survive summary judgment under any meaningful pleading standard, and there were two alternative bases for the district court's summary judgment ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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